

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

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TRUSTEES OF THE CONSTRUCTION  
INDUSTRY AND LABORERS HEALTH  
AND WELFARE TRUST; TRUSTEES OF  
THE CONSTRUCTION INDUSTRY AND  
LABORERS JOINT PENSION TRUST;  
TRUSTEES OF THE CONSTRUCTION  
INDUSTRY AND LABORERS VACATION  
TRUST; TRUSTEES OF THE SOUTHERN  
NEVADA LABORERS LOCAL 872  
TRAINING TRUST; TRUSTEES OF THE  
CEMENT MASONS AND PLASTERERS  
HEALTH AND WELFARE TRUST;  
TRUSTEES OF THE CEMENT MASONS  
AND PLASTERERS JOINT PENSION  
TRUST; TRUSTEES OF THE CEMENT  
MASONS AND PLASTERERS VACATION  
SAVINGS TRUST; AND TRUSTEES OF  
THE CEMENT MASONS AND  
PLASTERERS JOINT APPRENTICESHIP  
TRAINING TRUST,

Plaintiffs,

v.

RUBEN G. VASQUEZ, an individual; and  
S&G FIREPROOFING, INC., a revoked  
Nevada corporation,

Defendants.

2:09-cv-02231-LRH-GWF

ORDER

1 Before the court is Plaintiffs' Supplemental Brief (#25) in support of their unopposed  
2 Motion for Summary Judgment Against Defendant Ruben G. Vasquez (#18).

3 **I. Facts and Procedural History**

4 Plaintiffs' supplement follows this court's order (#24) of September 29, 2011, granting in  
5 part and denying in part Plaintiffs' motion for summary judgment. The court determined that  
6 Vasquez was a fiduciary only as to employer contributions due during the time period from January  
7 2008 until Advanced Demolition Technologies, Inc.'s ("ADT") bankruptcy filing on June 24, 2008,  
8 *see* 29 U.S.C. § 1002(21)(A); that Vasquez breached his fiduciary duties by failing to make  
9 employer contributions to the trusts that were within his control, *see id.* § 1104(a)(1)(A)(i); and that  
10 Vasquez may be held personally liable as a fiduciary for delinquent contributions due prior to  
11 ADT's bankruptcy, *see id.* § 1109(a). Nonetheless, because the court determined that Vasquez was  
12 personally liable for only a portion of the unpaid employer contributions to the trusts, the court  
13 deferred entry of judgment pending supplemental briefing on the recoverable amounts of unpaid  
14 contributions, liquidated damages, interest, administrative fees, and attorney's fees and costs.

15 Plaintiffs submitted their supplemental brief on October 26, 2011. Plaintiffs' supplemented  
16 motion for summary judgment remains unopposed.

17 **II. Legal Standard**

18 While the nonmoving party's failure to file points and authorities in response to any motion  
19 is deemed to constitute consent to the granting of the motion under Local Rule 7-2(d), the failure to  
20 file an opposition, in and of itself, is not sufficient to grant summary judgment. *See Martinez v.*  
21 *Stanford*, 323 F.3d 1178, 1182 (9th Cir. 2003). The moving party must still meet its affirmative  
22 duty under Rule 56 to demonstrate its entitlement to judgment as a matter of law. *Id.* Thus, the  
23 absence of an opposition does not change Plaintiffs' burden, and the court will consider Plaintiffs'  
24 motion on the merits, subject to the usual burdens and standard of review applicable to motions for  
25 summary judgment. (*See* Order (#24), pp. 6-7.)

1 **III. Discussion**

2 Section 1109(a) provides that an ERISA fiduciary that “breaches any of the responsibilities,  
3 obligations, or duties imposed upon fiduciaries . . . shall be personally liable to make good to such  
4 plan any losses to the plan resulting from each such breach . . . and shall be subject to such other  
5 equitable or remedial relief as the court may deem appropriate.” 29 U.S.C. § 1109(a).

6 **A. Unpaid Contributions**

7 Plaintiffs have presented evidence indicating that, as a result of Vasquez’s failure to pay  
8 employer contributions for the period January 1, 2008, through May 31, 2008, the Laborers Trust  
9 Funds<sup>1</sup> and the Cement Masons Trust Funds<sup>2</sup> have suffered losses, respectively, of \$197,413 and  
10 \$72,330 in unpaid employee benefit contributions.<sup>3</sup>

11 Regarding the Cement Masons Trust Funds, the court finds that the \$3,459 in unpaid  
12 contributions from May 2008 are not recoverable. Plaintiffs’ damages calculations for the Cement  
13 Masons Trust Funds are erroneously based on a due date of the 20th of the month following the  
14 month of work (#25, p. 6), when in fact Section III(B) of the applicable plan documents specifies  
15 that contributions are due “by the 30th of the month . . . following the month of work” (#17-3, p.  
16 3). Accordingly, the contributions for the month of May 2008 did not become due until June 30,  
17 2008, after ADT’s bankruptcy filing on June 24, 2008. The May 2008 contributions are therefore

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19 <sup>1</sup>The “Laborers Trust Funds” include Plaintiffs Trustees of the Construction Industry and  
20 Laborers Health and Welfare Trust, Trustees of the Construction Industry and Laborers Joint Pension  
21 Trust, Trustees of the Construction Industry and Laborers Vacation Trust, and Trustees of the Southern  
Nevada Laborers Local 872 Training Trust.

22 <sup>2</sup>The “Cement Masons Trust Funds” include Plaintiffs Trustees of the Cement Masons and  
23 Plasterers Health and Welfare Trust, Trustees of the Cement Masons and Plasterers Joint Pension  
24 Trust, Trustees of the Cement Masons and Plasterers Vacation Savings Trust, and Trustees of the  
Cement Masons and Plasterers Joint Apprenticeship Training Trust.

25 <sup>3</sup>As to the Cement Masons Trust Funds, Plaintiffs’ computation table mistakenly excludes the  
26 January 2008 contributions from the column totals. The court has therefore adjusted Plaintiffs’ figures  
to reflect the actual column totals.

1 beyond the scope of the court's prior order finding Vasquez in control of and personally liable for  
2 only those contributions due before ADT's bankruptcy filing.

3 Having made these adjustments, the court finds that Vasquez is personally liable for unpaid  
4 contributions totaling \$197,413 for the Laborers Trust Funds and \$68,871 for the Cement Masons  
5 Trust Funds.

### 6 **B. Pre-judgment Interest**

7 Plaintiffs also seek pre-judgment interest on the unpaid contributions at a rate of 14%,  
8 simple interest, from the due date of the contributions, pursuant to the terms of the plan documents  
9 and ERISA. *See* 29 U.S.C. § 1132(g)(2) (in actions against an employer under § 1145, providing  
10 recovery for "interest on the unpaid contributions," which "shall be determined by using the rate  
11 provided under the plan").

12 Section 1109(a), governing damages on actions against a fiduciary, does not specifically  
13 provide for pre-judgment interest on unpaid contributions. Instead, it provides that a fiduciary may  
14 be held personally liable for consequential damages, disgorgement of profits made by the fiduciary  
15 with plan assets, and "such other equitable or remedial relief as the court may deem appropriate."  
16 29 U.S.C. § 1109(a). Nonetheless, Plaintiffs contend that Vasquez should be held liable to the  
17 same extent as an employer would be under § 1132(g)(2) because a fiduciary's failure to remit  
18 employee benefit contributions causes the same damages that an employer's delinquencies cause.

19 The court declines to automatically apply the statutory damages provisions of § 1132(g) to  
20 actions against a fiduciary under § 1109(a). Section 1109(a) specifically provides for the measure  
21 of damages in actions against an ERISA fiduciary, and those provisions plainly differ from the  
22 statutory damages provided under § 1132(g)(2) in actions against employers. While Congress  
23 could have easily provided the same measure of damages in each case, it specifically distinguished  
24 between actions against employers and fiduciaries in providing the measure of damages.

1           The court also finds that Plaintiffs have failed to present any evidence or otherwise establish  
 2 that Vasquez is subject to the damages provision of the plan documents, or that interest at 14% is a  
 3 reasonable estimate of the losses to the plan resulting from Vasquez's breach of fiduciary duties.  
 4 Indeed, aside from the unpaid contributions, there is no evidence before the court of any other  
 5 losses resulting from the breach or any profits made by Vasquez through use of the unpaid  
 6 contributions. *See* 29 U.S.C. § 1109(a). Accordingly, the court shall deny Plaintiffs' request for  
 7 pre-judgment interest.

### 8           **C. Liquidated Damages**

9           Plaintiffs also seek liquidated damages pursuant to § 1132(g)(2)(C) and the plan documents  
 10 of the higher amount of twenty percent of the unpaid contributions or accrued interest. However,  
 11 for the same reasons stated above, the court declines to award liquidated damages.

12           Indeed, even if liquidated damages were recoverable under the plan documents, the court  
 13 would find the liquidated damages provision void as a penalty. The Ninth Circuit has twice held  
 14 that liquidated damages provisions providing for twenty percent of unpaid contributions are not a  
 15 reasonable forecast of damages and are therefore void as a penalty. *See Parkhurst v. Armstrong*  
 16 *Steel Erectors, Inc.*, 901 F.2d 796, 798 (9th Cir. 1990); *Idaho Plumbers & Pipefitters Health &*  
 17 *Welfare Fund v. United Mech. Contractors, Inc.*, 875 F.2d 212, 217-18 (9th Cir. 1989) ("Where the  
 18 damages stipulated are unreasonable, a court will refuse to enforce the agreement on public policy  
 19 grounds."). In each case, there was no evidence indicating that the liquidated damages provision  
 20 was the result of a good faith attempt to set an amount equivalent to anticipated damages or a  
 21 reasonable forecast of just compensation for the harm actually caused by the delinquency.  
 22 *Parkhurst*, 901 F.2d at 798; *accord Idaho Plumbers*, 875 F.2d at 217-18.

23           The record here is likewise lacking in any such evidence. Moreover, in electing to seek  
 24 liquidated damages in amounts equal to accrued interest (\$109,454 and \$35,044), rather than at the  
 25 lower twenty percent flat rate, Plaintiffs have effectively sought liquidated damages at rates  
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1 exceeding fifty percent of the unpaid contributions (\$197,413 and \$68,871). Such a measure is  
 2 lacking in any justification and beyond any “reasonable forecast of just compensation for the harm  
 3 caused” by the failure to remit employer contributions. *Idaho Plumbers*, 875 F.2d at 217. The  
 4 court shall therefore deny Plaintiffs’ request for liquidated damages.

#### 5 **D. Attorneys’ Fees**

6 Finally, Plaintiffs seek attorneys’ fees and costs of \$23,765, prorated between the Laborers  
 7 Trust Funds and Cement Masons Trust Funds based on their respective recoveries in this action.  
 8 Such amounts include \$18,606 in accrued attorneys’ fees, \$158.58 in accrued costs, and \$5,000 for  
 9 attorneys’ fees that Plaintiffs anticipate incurring in collecting on the judgment.

10 Although § 1132(g)(2) provides for mandatory attorney’s fees and costs in an action against  
 11 an employer to enforce § 1145, the court has already determined that the provision is inapplicable  
 12 because this is an action against a fiduciary under § 1109. Nonetheless, subsection (g)(1) provides  
 13 that “[i]n any action under this subchapter [including § 1109] . . . the court in its discretion may  
 14 allow a reasonable attorney’s fee and costs of action to either party.” 29 U.S.C. § 1132(g)(1). In  
 15 exercising this discretion, the court considers, among other things, the following factors: “(1) the  
 16 degree of the opposing parties’ culpability or bad faith; (2) the ability of the opposing parties to  
 17 satisfy an award of fees; (3) whether an award of fees against the opposing parties would deter  
 18 others from acting in similar circumstances; (4) whether the parties requesting fees sought to  
 19 benefit all participants and beneficiaries of an ERISA plan or to resolve a significant legal question  
 20 regarding ERISA; and (5) the relative merits of the parties’ positions.” *Carpenters S. Cal. Admin.*  
 21 *Corp. v. Russell*, 726 F.2d 1410, 1415 (9th Cir. 1984) (quoting *Hummell v. S.E. Rykoff & Co.*, 634  
 22 F.2d 446, 453 (9th Cir. 1980)).

23 Having considered these factors, the court finds an award of attorneys’ fees and costs  
 24 appropriate in this matter. The court also finds, however, that there is no basis for an award of  
 25 anticipated attorneys’ fees. Also, given that the court has denied Plaintiffs’ motion for default  
 26

1 judgment against S&G Fireproofing, Inc., dismissed S&G as a defendant, and granted only partial  
2 recovery against Vasquez, the court finds that Plaintiffs are entitled to only a portion of the  
3 attorneys' fees incurred in prosecuting this action.

4 IT IS THEREFORE ORDERED that Plaintiffs' Supplemental Brief (#25) in support of  
5 their Motion for Summary Judgment Against Defendant Ruben G. Vasquez (#18) is GRANTED in  
6 part and DENIED in part. Judgment shall be entered against Defendant Ruben G. Vasquez and in  
7 favor of the Laborers Trust Funds for \$197,413 in damages and \$7,500 in attorneys' fees and costs,  
8 and in favor of the Cement Masons Trust Funds for \$68,871 in damages and \$2,500 in attorneys'  
9 fees and costs.

10 The Clerk of the Court shall enter judgment accordingly.

11 IT IS SO ORDERED.

12 DATED this 16th day of April, 2012.

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LARRY R. HICKS  
UNITED STATES DISTRICT JUDGE